

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

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| UNITED STATES OF AMERICA, | . | Case No. 1:09-cr-147 |
| | . | |
| Plaintiff, | . | |
| | . | Sentencing |
| - v - | . | |
| | . | Wednesday, February 3, 2010 |
| FRANK G. LARSON, | . | 10:00 AM |
| | . | |
| Defendant. | . | Cincinnati, Ohio |
| | . | |

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE HERMAN J. WEBER, SENIOR JUDGE

For the Plaintiff: KEVIN C. CULUM, ESQ.
DONALD M. LYON, ESQ.
United States Department of Justice
Antitrust Division
Carl B. Stokes U.S. Court House
801 West Superior Avenue
Cleveland, Ohio 44113-1857

For the Defendant: WILLIAM MICHAEL, JR., ESQ.
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WILLIAM R. GALLAGHER, ESQ.
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The Citadel
114 East Eighth Street
Cincinnati, Ohio 45202

Also present: Laurie Cooke, Pretrial Services
Laura S. Jensen, Probation Officer
Special Agent James Brennan, FBI
David F. Axelrod, Esq.

Law Clerk: Amy Peters Thomas, Esq.

Courtroom Deputy: Darlene Maury

*Proceedings recorded in stenotype;
transcript prepared by computer.*

Court Reporter: Luke T. Lavin, RDR, CRR
838 Potter Stewart U.S. Courthouse
100 East Fifth Street
Cincinnati, Ohio 45202

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P R O C E E D I N G S

(In open court at 10:00 AM.)

THE COURT: Proceed, Ms. Maury.

COURTROOM DEPUTY: Judge, on the docket this morning is Criminal Action 09-147, the *United States of America versus Frank Larson*.

Appearing on behalf of the government is Kevin Culum and Don Lyon. Appearing on behalf of the defense is William Michael and William Gallagher, and the defendant is present in the courtroom.

THE COURT: On a former day, the Court accepted the tendered plea of guilty of Mr. Larson to a violation of Title 15, Section 1, of the United States Code, conspiracy to restrain trade. Having done so, it was the duty of the Court to accept and find him guilty of the offense, which subjects him to a sentence of imprisonment of ten years, a fine of \$1 million, or twice the pecuniary gain or loss, a special assessment, restitution, and supervised release. However, the policy statements at the United States Sentencing Guidelines 2R1.1, 3E1.1 and 5E1.1 are instructive in determining a sentence in this case that is sufficient but not greater than necessary to comply with the purposes set forth in 18, United States Code, Section 3553(a).

The offense concluded on July 17th, 2007. The defendant entered a plea of guilty on October 13, 2009. The provisions

1 of the Antiterrorism and Effective Death Penalty Act of 1996
2 apply to this case because the commission of the offense
3 occurred after April the 24th, 1996. The applicable Sentencing
4 Guideline manual is 2009.

5 The Court has before it the Information that was filed, the
6 Plea Agreement, which are all matters of public record, the
7 presentence report under the date of December 17th, 2009, that
8 has been amended as late as last week, a motion for downward
9 departure by the United States, and the defendant's sentencing
10 memoranda.

11 In view of the fact that the Plea Agreement does not
12 provide for restitution to any alleged victims, I will begin by
13 asking the United States to present to the Court a record as to
14 its best efforts in complying with 18, United States Code,
15 Section 3771.

16 MR. CULUM: Thank you, Your Honor.

17 THE COURT: Proceed, Mr. Culum.

18 And first of all, are there any victims or anyone in the
19 courtroom that wishes to speak at these proceedings?

20 MR. CULUM: Mr. Axelrod is in the courtroom. I'm not
21 sure if he wants to speak.

22 MR. AXELROD: Your Honor, I don't think I have
23 anything to say today.

24 THE COURT: Thank you.

25 Anyone else? And as I say, I do not know most of the

1 people here in the courtroom, except the court personnel, of
2 course.

3 All right. Proceed with giving me the information that's
4 of the compliance with 3771.

5 MR. CULUM: Thank you, Your Honor.

6 Your Honor, we have in this case as well, as part of our
7 continuing notice to all the victims of the conspiracy that is
8 what we call the Home City/Arctic Glacier conspiracy of
9 southeastern Michigan, we have sought and obtained a newspaper
10 ad in the Detroit Free Press. We will continue to provide
11 notice. On our Web site all hearings, all public forums are
12 being provided to any victim. We continue to try to reach out
13 to all victims that we can.

14 It is very difficult to identify all the victims in this
15 case, which would be the people who buy the ice from the --
16 from Arctic Glacier and Home City. We continue to do so. We
17 have talked to the plaintiff's counsel, the lead counsel Mr.
18 Kohn, and he is well aware of our situation. And we believe we
19 have fully complied with the dictates of the United States
20 Code.

21 THE COURT: All right. You're satisfied with that
22 representation?

23 MR. CULUM: I am, Your Honor. The only thing is, I am
24 99 percent certain we have put the ad in, but -- I know that we
25 have -- I think we have. I have not seen the ad, but I'm sure

1 we have.

2 THE COURT: The one situation is the class action in
3 Michigan and your conversation with the people that are members
4 of that class.

5 MR. CULUM: Yes, Your Honor. We have continuing
6 discussions. They continue to -- we continue to provide them
7 whatever information we can publicly, and they are well aware
8 of the sentencing today, the sentencing tomorrow, and the
9 sentencing next week. And we continue to provide notice to all
10 victims both through the newspaper and through our Web site.

11 THE COURT: Well, I must state for the record that I'm
12 looking at each one of these cases individually, not together.

13 MR. CULUM: I understand that.

14 THE COURT: So the information that is presented in
15 one case is not necessarily in the other, any of the other
16 cases, unless I decide that it is.

17 MR. CULUM: I understand, Your Honor.

18 THE COURT: All right. Then with that in mind, I will
19 ask at this time whether you wish to proceed with this matter.
20 In view of the amendment to the presentence report that was
21 made just a few days ago, you're entitled to a continuance.

22 MR. MICHAEL: Your Honor, Mr. Larson and I have
23 reviewed the amendment. We're satisfied with it. We have no
24 request to extend this process. We're prepared to go forward
25 today.

1 THE COURT: All right. The Plea Agreement sets forth
2 a proposed stipulation as to the applicability of the Guideline
3 computation in this matter. The presentence report agrees with
4 that computation, and the motion of the defendant which has
5 been filed in this case requests that the computation that has
6 been stipulated be affirmed by the Court.

7 Is that correct?

8 MR. CULUM: Yes, Your Honor.

9 THE COURT: Now, the one item that has not been agreed
10 to is the fine, and I say that's a very serious matter here,
11 because the lower end of the fine is over \$200,000. And I want
12 everyone to understand that that's what I am considering: a
13 substantial fine in this case.

14 Now, once I impose my sentence, you cannot withdraw your
15 plea of guilty. And say I impose a maximum fine, which we
16 discussed when I accepted your plea of guilty. I want you to
17 consider that.

18 Now, then, do you wish to proceed?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: All right. We'll proceed, then.

21 Now, have you received a copy of the presentence report and
22 the addendums? And it was dated December the 17th, 2009, and
23 the addendums were just last week. Have you received that?

24 MR. MICHAEL: We did, Judge. I have had an
25 opportunity to go over that with Mr. Larson in great detail.

1 We had received originally a draft. We made certain very minor
2 suggested changes to the probation office, as I believe did the
3 government. Those were incorporated into the final draft.

4 We have no objections to either the factual recitation
5 within the presentence investigation report nor the applicable
6 Guideline calculation that's set forth within it.

7 THE COURT: And, Mr. Larson, have you received a copy
8 of the report and had a chance to review it?

9 THE DEFENDANT: Yes, sir, I have.

10 THE COURT: And do you have any -- are you satisfied
11 with it? Do you have any questions about it at this point in
12 time?

13 THE DEFENDANT: No, sir, I don't.

14 THE COURT: The Court then will accept the report as
15 part of the sentencing facts in this case. How I apply them
16 will depend on our later discussion.

17 Does the United States have anything they wish to add as
18 far as the applicability of the Guidelines to this case are
19 concerned?

20 MR. CULUM: No, Your Honor.

21 THE COURT: Does the defense?

22 MR. MICHAEL: Not at this time, Judge.

23 THE COURT: The addendum to the presentence report
24 discloses that no objections remain for resolution by the
25 Court. Pursuant to United States Sentencing Guidelines

1 2R1.1(a), a base offense level of 12 and a four-level
2 enhancement is appropriate because the commerce affected was
3 \$23 million.

4 The defendant qualifies for a two-level reduction for
5 acceptance of responsibility and a one-level reduction because
6 he timely notified authorities of his intention to plead
7 guilty.

8 The applicability of the Guidelines establishes 13 as the
9 total offense level, I as the criminal history category, and 12
10 to 18 months as the sentencing range.

11 The government has indicated that the government has -- or
12 that the defendant has provided substantial assistance and is
13 requesting a downward departure pursuant to 5K1.1 to a level
14 below 13. Based upon the government's request and its
15 representation that the defendant has provided substantial
16 assistance to the government in the prosecution of the
17 defendant, the Court finds that a downward departure is
18 justified in this case and departs from an offense level of 13
19 to an offense level of 10.

20 A sentence in this range will reward the defendant for his
21 assistance but will also satisfy the statutory purposes of
22 sentencing, including the need to reflect the seriousness of
23 the offense, promote respect for the law, and provide a just
24 punishment for the defendant's involvement in the instant
25 offense.

1 Accordingly, the Court establishes 10 as the total offense
2 level, I as the criminal history category, and six to 12 months
3 as the sentencing range.

4 Pursuant to Application Note 2 to United States Sentencing
5 Guideline 5B1.1, the defendant is eligible for a term of
6 probation because his Guideline range places defendant in Zone
7 B of the sentencing table if the Court imposes conditions.

8 Pursuant to 18, United States Code, Section 3563(d), the
9 defendant is eligible for a term of probation of one to five
10 years because the instant offense is a Class C felony.

11 Pursuant to United States Sentencing Guideline 5C1.1(c),
12 when the applicable range is a Zone B, is in Zone B of the
13 sentencing table, the minimum term may be satisfied by a
14 sentence of imprisonment or a sentence of imprisonment that
15 includes a term of supervised release with a condition that
16 includes a term of -- with a condition that substitutes
17 community confinement or home detention, providing at least one
18 month is satisfied by imprisonment, or a sentence of probation
19 that includes a condition or combination of conditions that
20 substitutes intermittent confinement, community confinement, or
21 home detention for imprisonment.

22 Pursuant to United States Sentencing Guideline 5D1.2, a
23 term of two to three years of supervised release is applicable.
24 Pursuant to United States Sentencing Guideline 5E1.2(b), if the
25 Guideline for the offense in Chapter Two provides a specific

1 rule for imposing the fine, the rule takes precedent over
2 subsection (c).

3 Pursuant to United States Sentencing Guideline 2R1.1(c)(1),
4 for an individual the Guideline fine range shall be from one to
5 five percent of the volume of commerce, but not less than
6 \$20,000. Accordingly, the greater minimum fine in this case is
7 \$230,000, and the greatest maximum fine is \$1 million.

8 Pursuant to United States Sentencing Guidelines 5E1.2 (1),
9 an additional fine amount of \$2,157.88 a month to pay the cost
10 to the government of any imprisonment, \$1,990.13 a month for
11 offenders in halfway house, \$311.94 to pay the cost to the
12 government of supervised release must be considered. The daily
13 cost of home confinement is \$3.18.

14 Pursuant to United States Sentencing Guidelines 5E1.2(f),
15 the Court finds that the defendant is able to pay a fine.
16 Accordingly, a fine shall be ordered.

17 According to 18, United States Code, Section
18 366(a)(1)(B)(ii), to the extent that the Court determines that
19 the complication and prolongation of the sentencing process
20 resulting from the fashioning of an order of restitution under
21 this section outweighs the need to provide restitution to any
22 victim, the Court may decline to make an order of restitution.

23 In this case the victims would be the customers of Arctic
24 Glacier who did not benefit from competition in their
25 respective areas. Determining a restitution figure is

1 difficult due to the nature of the offense. Allocation of
2 customers rather than price fixing makes quantifying damages
3 difficult, if not impossible, to determine.

4 Pursuant to United States Sentencing Guidelines 5E1.3, a
5 special assessment of \$100 shall be ordered.

6 The Court recognizes that Sentencing Guidelines are
7 discretionary, and it has the authority to depart upward or
8 downward from the Guideline range established in this order and
9 to sentence the defendant to any sentence under the statutory
10 maximum.

11 In accordance with 18, United States Code, Section
12 3553(c)(1), the Court is not required to state a reason for
13 imposing a sentence at a particular point within the range,
14 because the range in this case does not exceed 24 months.

15 Based upon the record in this case, including the
16 information contained in the presentence report, the Court
17 accepts the Rule 11(c)(1)(B) Plea Agreement, specifically
18 finding that the agreement adequately reflects the seriousness
19 of the actual offense behavior and that accepting the Plea
20 Agreement will not undermine the statutory purposes of
21 sentencing.

22 That would end my discussion of the Sentencing Guidelines.
23 Does the United States have any addition or anything that they
24 wish to comment or anything further for the record?

25 MR. CULUM: Your Honor, I'd just like to make a

1 comment as to Mr. Larson's cooperation. I don't know if this
2 would be an appropriate time, or later.

3 THE COURT: It's fine if you want to reserve the --
4 will it change the offense level, et cetera, at this time?

5 MR. CULUM: No, Your Honor.

6 THE COURT: And if it's more applicable to the
7 consideration of the 3553 section, but I do -- I've already
8 considered it, and I reduced the level to 10.

9 Now, if you want to discuss a lower level than 10, that's
10 fine. And, I mean, that can go all the way down to a level 1
11 if his cooperation was important. You did not indicate any
12 information as to the depth of the departure, and I used a
13 figure of three, which will permit me to impose a sentence in
14 accordance with the suggestions.

15 MR. CULUM: Well, and I will make my comments at 3553,
16 and I hope that -- I know that you will take them into
17 consideration, but I'll make those points.

18 THE COURT: And if the level should be lower than 10,
19 why, then, that might have other advantages. I don't know.
20 That's what we're discussing at this time.

21 Does the defense have anything they want to add at this
22 time as far as the Guidelines are concerned?

23 MR. MICHAEL: Not at this time, Judge. I believe that
24 the way that the Court has structured the reduction, when
25 looking at 5C1.1(c)(3) and 5C1.1(e)(3), the Court is, even with

1 the Guidelines, able to get to where there have been some
2 recommendations, including our recommendation within the
3 sentencing memo irrespective of the 3553(a) factors. So we're
4 comfortable and don't wish to make further comment at this
5 time.

6 THE COURT: All right. I appreciate that, but please
7 understand that I am proceeding under 2R1 at this time and not
8 the general fine section --

9 MR. MICHAEL: Yes, sir.

10 THE COURT: -- that you suggested in the memo.

11 MR. MICHAEL: Yes, sir. At the time we filed the
12 sentencing memo, I believe the addendum which had identified
13 the 2R1.1 fine issue had not been filed with the Court, and so
14 we were going under the earlier fine recommendation.

15 I'm certainly able and happy and will address the fine
16 circumstance at the appropriate time.

17 THE COURT: And if you're willing to proceed on that
18 basis, why, that's fine.

19 MR. MICHAEL: Yes, sir. The only comment I would make
20 with respect to the Guideline range and the 5K motion is that I
21 believe that, just as this Court is authorized to reduce
22 downward a Guideline range with a filing of a 5K1.1 motion,
23 it's likewise able to use that to reduce down any fine range
24 that is within the Guideline section.

25 THE COURT: I guarantee you I'll reduce it from the \$1

1 million. That's all I'll guarantee you.

2 MR. MICHAEL: Yes, sir.

3 THE COURT: The Court then will pursue the issue under
4 18 3553. The first issue that I feel is important to discuss
5 is the (a)(7), which is the restitution provision in 3553(a)
6 and the justification for the Court's finding that the
7 restitution would needlessly prolong these proceedings.

8 Mr. Culum?

9 MR. CULUM: I agree, Your Honor.

10 THE COURT: Do you want to discuss that for the
11 record?

12 MR. CULUM: Your Honor, the Eastern District of
13 Michigan has a class action lawsuit that includes both direct
14 and indirect purchasers. We have made every effort to notify
15 the victims in this case. The number of victims is difficult
16 to determine. The amount of loss any particular victim would
17 have a right to seek for restitution is very difficult in a
18 customer allocation case because it's very difficult to
19 establish what the price would have been absent the agreement,
20 and clearly, in our opinion, would unnecessarily delay this
21 sentencing in this case. And, therefore, we would agree that
22 restitution is unnecessary in this case concerning the civil
23 litigation.

24 THE COURT: And I think probably it's appropriate that
25 I point out at this time that 3771 provides in (d)(6), "Nothing

1 in this chapter shall be construed to impair the prosecutorial
2 discretion of the Attorney General or any other officer under
3 his direction." I think it's important that that's part of the
4 record --

5 MR. CULUM: Thank you, Your Honor.

6 THE COURT: -- that whoever reads this record knows
7 that I'm considering that.

8 MR. CULUM: Thank you, Your Honor.

9 THE COURT: Are there any other comments that you wish
10 to make as to the other elements of 3553? And now it would be
11 appropriate for your downward departure.

12 MR. CULUM: Thank you, Your Honor.

13 And we'll stand just because --

14 I want the Court to know I've done this a good deal of
15 time, and whenever you meet with someone who has violated
16 antitrust laws, it can be -- it's always interesting to meet
17 them for the first time, because you've got to know them
18 through their conduct, and you get to know the person
19 personally.

20 The first time we met with Mr. Larson, he was
21 understandably concerned, and often -- understandably
22 concerned.

23 That being said, he was forthright, he was very candid, and
24 he was truthful. We met with him multiple times. We expect to
25 meet with him. We know, we expect, and he will continue to

1 meet with us and continue to cooperate.

2 We expect there's a possibility that at some point he will
3 testify at trial. We have decided, unlike most situations, to
4 go forward with this sentencing so he could go forward with his
5 life.

6 Oftentimes in these situations we delay the sentencing
7 until the person has an opportunity to testify so you, Your
8 Honor, could see how he would have testified. I am confident
9 that he will testify well when asked to do so. But in this
10 case, because of his unemployment situation, his personal
11 situation, we want to move forward with sentencing to allow him
12 to go on with his life. And please do not read into the record
13 any -- assume anything that we don't expect that cooperation to
14 be anything less than stellar because of us going forward at
15 this time.

16 It is an -- you know, he has a right to move on with his
17 life, and we are allowing him to do so.

18 THE COURT: Anything you wish to add at this time on
19 the 3553 factors?

20 MR. MICHAEL: Judge, other than to make some --

21 THE COURT: You can go right down the line, if you
22 wish, on them.

23 MR. MICHAEL: Judge, I'm going to be brief.

24 I think that the probation office has done a very good job
25 of setting forth the circumstances here of Mr. Larson. Many of

1 those apply to the 3553(a) factors.

2 You know, this is a case where, first, we very much
3 appreciate the comments that Mr. Culum has made. I would say
4 that those comments were earned by Mr. Larson's activities and
5 that -- and the earning of those activities is something that
6 really is reflective of his characteristic as an individual.

7 You know, it's been said that the true measure of a man is
8 not to be how he succeeds in life but, instead, how he recovers
9 from difficult circumstances, and in part these difficult
10 circumstances occurred several months ago when the Department
11 of Justice first announced, if you will, its investigation of
12 Mr. Larson and Arctic Glacier.

13 Mr. Larson's activities at that time were in essence to
14 direct me to make contact with the Department of Justice to do
15 what he needed to do to make things right, and Mr. Larson has
16 done that from the beginning, continues to do it, and is
17 anticipating providing whatever assistance that the United
18 States deems necessary and that he can provide going forward.

19 It is a circumstance where Mr. Larson did not personally
20 profit from this. There was no personal gain to him. While he
21 certainly accepts his own circumstances and his own
22 responsibility for his actions, it was a circumstance that was
23 practiced industrywide. And while that doesn't excuse the
24 conduct, it is something that this Court should be aware of.
25 It was a practice that was industrywide and done routinely.

1 Mr. Larson now knows that that is completely inappropriate, and
2 he has tried to rectify his actions ever since.

3 I think, Judge, that this is a very difficult economic time
4 for the whole country. As the Court is aware, Mr. Larson lost
5 his job with Arctic Glacier back in approximately March of last
6 year. He has been unemployed -- with four children, one in
7 college -- throughout this time period.

8 We've had long discussions with Mr. Culum about whether or
9 not it made sense to prolong the sentencing so that all of Mr.
10 Larson's cooperation could be done. For reasons that Mr. Culum
11 touched on, it was decided to move forward quickly to try and
12 allow Mr. Larson to move on.

13 I will tell this Court that Mr. Larson was able to secure a
14 job starting last Friday as an operations manager for a small
15 private company. He's hopeful that, in this economy, he'll be
16 able to keep that job. He's hopeful that after today the
17 circumstances will allow him to keep that job. It's difficult
18 enough for many people in this country right now to have a job,
19 let alone one who will walk out of this courtroom a convicted
20 felon.

21 We do believe that Mr. Larson is well on his way to picking
22 himself up from those difficult circumstances he finds himself
23 in. While his actions don't necessarily indicate an aberrant
24 behavior as defined by the Guidelines, it really is aberrant
25 behavior from his lifetime of activity. He's a good person,

1 and we'd ask this Court to fashion a sentence appropriate to
2 allow him, under the factors of 3553(a), to keep the job and to
3 become the productive member of society that he has been in the
4 past and wants to continue to be.

5 Thank you.

6 THE COURT: Would you refer to paragraph 56 of the
7 presentence report.

8 MR. MICHAEL: Yes, sir.

9 THE COURT: And do you see what the suggestion there
10 is? And now you know the Guideline fine range.

11 MR. MICHAEL: Yes, sir. And if I could address that
12 specifically, then.

13 THE COURT: Well, you'd better.

14 MR. MICHAEL: Judge, the Guideline range, as we
15 discussed briefly before, has now under the --

16 THE COURT: The Guideline range has always been the
17 Guideline range. 2R1.1 has not been changed, to my knowledge,
18 in the last several years.

19 MR. MICHAEL: Yes, sir.

20 THE COURT: So it was there when this agreement was
21 entered into.

22 MR. MICHAEL: It was, Judge.

23 THE COURT: Proceed.

24 MR. MICHAEL: With respect to the Guideline range, we
25 would ask this Court to fashion a fine that is below the

1 Guideline range. We would ask this Court to sentence Mr.
2 Larson to a fine as part of his sentence that is below the
3 recommended Guideline range as recommended by probation and
4 under this Court's authority under both 3553(a) as well as the
5 Guideline 5K1.1 motion that was filed by the government.

6 Your Honor, we, as you, see what Mr. Larson's financial
7 circumstances are. They're set forth in the presentence
8 investigation report.

9 THE COURT: And I'm trying to avoid placing them in
10 the public record.

11 MR. MICHAEL: Yes, sir. And --

12 THE COURT: But do you have any comment on that
13 rendition of his financial situation?

14 MR. MICHAEL: That they are accurate, the rendition is
15 accurate, Judge.

16 THE COURT: Thank you.

17 MR. MICHAEL: Obviously, there was an amount of money,
18 and that may not have been obvious, but there was an amount of
19 money that was paid as part of his termination.

20 THE COURT: I understand what that amount is. I'm not
21 interested in putting it into the record --

22 MR. MICHAEL: Yes, sir.

23 THE COURT: -- public record.

24 MR. MICHAEL: And as this Court is aware, the monthly
25 cash flow that Mr. Larson has been under since, you know, he

1 lost his employment has been significant.

2 I raise the fact that Mr. Larson now has a job. It impacts
3 not only him moving forward. Obviously, it impacts the
4 financial circumstances as well. We recognize that.

5 We do believe, though, that there was no personal profit
6 made to Mr. Larson. That's one of the issues I believe is an
7 overriding factor in whether or not a fine should be given.

8 Here the Court is authorized to depart downward from that
9 fine range. Judge, Mr. Larson sits here probably with more
10 assets than the Court often sees by individuals. We recognize
11 that.

12 We also --

13 THE COURT: And he came through the recent tragedies
14 of the last two or three years in pretty good shape.

15 MR. MICHAEL: Better than an awful lot of Americans,
16 Judge.

17 THE COURT: That's right.

18 MR. MICHAEL: And for that he's thankful.

19 THE COURT: Well, that's because of his intelligence
20 and wise advice.

21 MR. MICHAEL: And very hard work.

22 THE COURT: That's right.

23 MR. MICHAEL: And something that he hopes to continue.

24 It's my belief, Judge, that had there been a personal
25 profit involved here, then this Court would certainly --

1 THE COURT: Well, I would have taken it all then. I
2 would have degorged it.

3 MR. MICHAEL: Yes, sir.

4 THE COURT: All right. Now, let's go ahead.

5 MR. MICHAEL: Well, Judge, in this case because there
6 wasn't that, I think the --

7 THE COURT: I'm not going to degorge him of all his
8 assets.

9 MR. MICHAEL: Yes, sir.

10 THE COURT: I agree with you.

11 MR. MICHAEL: I would certainly ask this Court to
12 depart downward. We believe a small fine is appropriate.
13 We've asked for that even in our recommendation to the Court.
14 We don't believe that \$230,000, under all the circumstances, is
15 appropriate, even considering the assets that Mr. Larson has
16 been able to acquire. He has a need to move forward with his
17 family and his economic circumstance. He needs to try and
18 recover from the negative monthly cash flow that he's had.

19 We leave to the Court its discretion as to the amount. I
20 stand by my recommendation that it be a very low amount,
21 though.

22 THE COURT: Thank you.

23 Is there anything you wish to add, Mr. Culum?

24 MR. CULUM: No, Your Honor, other than the departure
25 motion does go to the fine, as you well know. The \$230,000 as

1 the low end of the Guidelines, in these situations -- this is
2 one of those places where it's very hard to understand where
3 the Guidelines work in the individual situation, because Mr.
4 Larson did not profit personally. The 20,000, though, is a
5 good example of a substantial fine that would be, you know --
6 you know, an appropriate time to look at.

7 And we'd just ask you to look at the departure motion. We
8 think that \$230,000 is the Guideline range, but you are free to
9 depart if you choose.

10 THE COURT: The Court then will proceed to discuss
11 the --

12 I'm sorry. I don't mean to leave you out of this
13 discussion, Mr. Larson, because it's you and I that are going
14 to pay the price here.

15 THE DEFENDANT: Understood.

16 THE COURT: Lawyers never go to jail, at least when
17 they represent someone. Sometimes, but very seldom.

18 Do you have anything you wish to add to the record, you
19 wish me to understand as to these factors?

20 And I'll review the factors with you at this time. It's
21 the nature and circumstances of the offense, your history and
22 characteristics, the need for the sentence imposed to reflect
23 the seriousness of the offense, to promote respect for the law,
24 and to provide just punishment for the offense; to afford
25 adequate deterrence to criminal conduct; to protect the public

1 from further crimes of the defendant; and to provide the
2 defendant with needed educational or vocational training,
3 medical care, or other correctional treatment in the most
4 effective manner, the kinds of sentences available, the kinds
5 of sentences and sentencing range established by the United
6 States Sentencing Guidelines, which we have -- that last one we
7 have just gone through.

8 So those are the things that I am considering now, and
9 those are the things that will determine my acceptance of your
10 position and my sentence that I will impose upon you, and so
11 that's what I'm asking you.

12 Do you have anything you wish to add to my understanding of
13 those particular elements?

14 THE DEFENDANT: No, sir.

15 THE COURT: The Court then will proceed to discuss the
16 elements.

17 The nature and circumstances of the offense. The offense
18 is serious. However, I think the record clearly shows that the
19 government believes that this was not one of the major
20 situations in their fight against the antitrust -- or their
21 fight for the antitrust laws of this country.

22 The history and characteristics of the defendant. They are
23 outstanding in your favor, so that weighs heavily in favor of
24 some departures in this matter. The nature and circumstances
25 of the offense also weigh somewhat in favor.

1 But it is necessary for me to fashion a sentence that will
2 promote respect for the law not only by you, which I am sure
3 you do, but by others, and I must have it be just punishment.
4 Just punishment is defined by Congress as sufficient but not
5 greater than necessary.

6 To afford adequate deterrence to criminal conduct. Now,
7 that doesn't mean you; that means society as a whole. And our
8 country is in tragic shape now because of the activities of our
9 heads of industry and their activities that were against the
10 law. That's why it's hard to find a job now. That's why we
11 are so far in debt as a nation that we may never see the light
12 of day, because of executives breaking the law, whether they're
13 on Wall Street or on Main Street. You happen to be in
14 Minnesota.

15 I find, however, that the next one -- to protect the public
16 from further crimes that you might commit -- there is
17 absolutely no danger of that, and that weighs heavily in your
18 favor, that you need to get on with your life, take care of
19 your family, that you do not need any other correctional
20 treatment or vocational training. You're already educated,
21 practically and formally, and you are in excellent health.

22 The kinds of sentences available, that has been discussed
23 in relationship to the Guidelines. I have -- I respect the
24 information and the suggestions made by the probation officer,
25 by the government, and by the defense on that issue.

1 I've already considered the restitution issue and we have
2 made the record relating to that. And it's unfortunate that
3 restitution may be an impossible situation in this criminal
4 context, that it would needlessly prolong a sentencing process,
5 that the Constitution would not permit. So I have decided that
6 restitution will not be ordered in this matter.

7 I find that incarceration is not necessary in this case.
8 The Court varies or departs, if you will, from the one-month
9 sentence required to the one-day sentence that you've already
10 served.

11 A sentence of this one day confinement with the six months'
12 home detention and community service during supervised release
13 takes into account the provisions of 18, United States Code,
14 Section 3553(a)(1), which includes the nature and circumstances
15 of the offense and the defendant's criminal history. A
16 sentence of one day confinement with six months' home detention
17 and community service during supervised release will reflect
18 the seriousness of the offense, promote respect for the law,
19 and provide just punishment, which is consistent with 18
20 3553(a)(2) by serving as a deterrence, protecting the
21 community, and providing the defendant with the ability to meet
22 his other responsibilities.

23 The sentence is within the availability of the sentences
24 available to the Court, and this sentence avoids unwarranted
25 disparity among defendants who committed similar offenses and

1 have similar backgrounds, as mandated by 18, United States
2 Code, Section 3553(a)(4), (5) and (6), as far as it relates to
3 the sentence of imprisonment. It does not, in my opinion,
4 relate to the amount of fine in the case, which we will
5 discuss.

6 I would conclude, then, my remarks as far as the 18 3553
7 factors are concerned, and finding that I can accept the
8 suggestion made in the Plea Agreement and can accept the
9 suggestion made in the defendant's memoranda, sentencing
10 memoranda, in regard to the information I have just placed into
11 the record.

12 The Court now would move to the actual sentencing portion
13 of this proceedings. Does the United States have anything they
14 wish to add to the sentence, either in aggravation or
15 mitigation of sentence, as to the discussion the Court has had
16 with 18 3553 factors in regard to the imprisonment and, for
17 that matter, the fine, which I presume we'll discuss in detail
18 during the sentencing portion of the proceedings?

19 MR. CULUM: No, Your Honor.

20 THE COURT: Mr. Michael?

21 MR. MICHAEL: Nothing other than what we've discussed
22 previously, Judge.

23 THE COURT: Mr. Larson, anything you want to -- do you
24 have any questions? I'll ask it that way.

25 THE DEFENDANT: No. I think Mr. Michael has

1 explained.

2 THE COURT: All right. As far as the sentence is
3 concerned, does the United States have anything further they
4 wish to say in regard to the sentence?

5 MR. CULUM: No, Your Honor.

6 THE COURT: Mr. Michael? And I think this is the
7 time.

8 MR. MICHAEL: Judge, I've made many of the comments to
9 this Court under the 3553(a) factors. I know Mr. Larson has
10 some brief comments he wants to address to the Court.

11 I do believe that, you know, Mr. Larson has learned from
12 this circumstance and, more importantly, is looking to move
13 forward and use this to not only teach himself but to teach
14 others the consequences here.

15 I do believe that this Court has identified an issue. We
16 leave it to the discretion of the Court with respect to the
17 amount of the fine. We've raised the issues that we feel are
18 appropriate, that there's been no personal gain, that he has
19 this negative cash flow, and we ask the Court to take those
20 into consideration in fashioning an appropriate fine in the
21 case.

22 And with that, I would turn it over to Mr. Larson.

23 THE COURT: Mr. Larson.

24 You may speak from your seat or stand, however you're more
25 comfortable. You may use the lecturn if you'd rather, whatever

1 you wish.

2 THE DEFENDANT: Okay. Thank you. I appreciate the
3 opportunity to say a few words.

4 I'd like to apologize for my actions that have caused all
5 of us to be here today. I don't think they are reflective of
6 how I have lived my life in the past and certainly have changed
7 how I will live my life in the future.

8 Secondly, I'd like to apologize to my wife and thank her
9 for --

10 THE COURT: Take your time. There's no hurry.

11 THE DEFENDANT: -- and thank her for her support. My
12 family has stuck by me all the way through and, I'm confident,
13 will continue to stick by me, as these have been very difficult
14 times.

15 I assure you that the experiences that I've felt over the
16 last two years will allow me to teach both -- it will teach me
17 and others as I go forward that you need to be responsible for
18 your actions each and every day, and I can only apologize to
19 you and to Mr. Culum and the government for what I've put
20 everyone through.

21 THE COURT: Anything else, sir?

22 THE DEFENDANT: That's it, sir.

23 THE COURT: Thank you.

24 Any comment, Mr. Culum?

25 MR. CULUM: No, Your Honor.

1 THE COURT: Anything further, Mr. Michael?

2 MR. MICHAEL: No, Judge.

3 THE COURT: Do you have any questions, Mr. Larson?

4 THE DEFENDANT: No, sir.

5 THE COURT: Do you have anything you wish to say as to
6 why the judgment of this Court should not be pronounced upon
7 you at this time?

8 THE DEFENDANT: No, sir.

9 THE COURT: It's the judgment of this Court that you
10 be committed to the custody of the Bureau of Prisons for a
11 period of one day, which has been served, and following
12 incarceration shall serve a term of supervised release of two
13 years under the following conditions:

14 You shall not commit another federal, state or local crime;

15 You are prohibited from possessing a firearm and other
16 dangerous weapon;

17 You shall refrain from the unlawful use of controlled
18 substances and submit to one drug test within 15 days of being
19 placed on supervised release and at least two other periodic
20 drug tests thereafter, as determined by the probation officer;

21 You shall report immediately to the probation office in the
22 Southern District of Ohio;

23 You shall comply with the conditions of home detention for
24 a period of 180 days, with electronic monitoring. During that
25 time you will remain at your place of residence except for

1 employment and other activities approved in advance by your
2 probation officer. You will maintain a telephone at your place
3 of residence without call forwarding, a modem, caller ID, call
4 waiting, or portable cordless telephone, including cell phone,
5 BlackBerries, and other similar devices for the above period.

6 At the direction of your probation officer, you shall wear
7 an electronic monitoring device, follow electronic monitoring
8 procedures specified by your probation officer, and pay the
9 daily costs of electronic monitoring, which may be waived by
10 the probation officer.

11 You shall contribute 100 hours of community service on a
12 schedule and at an agency approved by your probation officer.
13 You shall cooperate in collection of DNA as directed by the
14 probation officer, and you shall make payments on the criminal
15 monetary penalties.

16 You shall not open any new lines of credit or make
17 purchases on any existing lines of credit unless approved by
18 the probation officer. You shall disclose all financial
19 information requested by your probation officer.

20 You shall continue to comply with your agreement made in
21 your Plea Agreement, including cooperation with the government.
22 And additionally, there are 13 conditions that all persons that
23 serve a period of supervised release under an order of this
24 Court are required to follow. They're in writing and are
25 included in the judgment entry in this case and will be

1 explained to you by the probation officer.

2 You will be assessed a special assessment of \$100.

3 Have you paid this amount?

4 MR. MICHAEL: Not yet, Judge, but we're prepared to do
5 so right after court.

6 THE COURT: All right.

7 And as to the fine, the Guideline provision that you agreed
8 to makes the minimum fine \$230,000. However, I have placed you
9 under other restrictions. The 180-day home confinement, the
10 total lack of communications facilities that are so prevalent
11 now and so important, particularly to young people. These are
12 all circumstances that are penal in nature and, in my opinion,
13 take the place of at least what I would consider most of the
14 fine.

15 However, your situation is not the same as Mr. Corbin. For
16 example, your health, compared to his, is wonderful. Your age,
17 compared to his, is right at your prime. And your position was
18 major to his, and I think at the last, your last experience,
19 you were executive vice president of operations. So it was
20 during your watch that you permitted Corbin to engage in this
21 activity, and you did know about it. So the fine, in my
22 opinion, must be more than and will be more than the \$20,000
23 that was assessed against Mr. Corbin.

24 How do I pick a fine? I know what your net worth is. I
25 don't think it's fair that I use that. Your salary was

1 \$286,000 a year. I don't think it's appropriate that I use
2 that.

3 Your household expenses. You can multiply them out as I
4 did. I won't state them for the record. Just multiply them by
5 12, and you'll see what they are.

6 You had left over discretionary income. You can even
7 figure out the amount of discretionary income there was. I
8 don't know. I'm not figuring in the income tax.

9 Anyway, there are all these things that I have considered.
10 And I believe that, under all the circumstances, an appropriate
11 fine in your case, considering your great cooperation with the
12 government, considering your continued cooperation with the
13 government, that a fine of \$60,000 is appropriate for the two
14 years and four months that this conspiracy that was charged
15 against you, that you pled guilty to existed, and produced --
16 or affected at least \$23 million worth of the market, the share
17 of the market.

18 You have assets that you can pay this fine immediately.

19 THE DEFENDANT: I can't write a check today.

20 THE COURT: Oh, no. No.

21 THE DEFENDANT: Oh. I'm sorry.

22 THE COURT: I grant you that.

23 THE DEFENDANT: Okay.

24 THE COURT: But I'm going to give you 30 days, and
25 then if you can't pay it in 30 days for some reason, why, then

1 it will be charged interest, you'll be charged interest on it.

2 But I have looked at the -- I don't want to go into the
3 specifics of why I make that determination for the public
4 record. You know what the situation is.

5 THE DEFENDANT: (Nods head up and down.)

6 THE COURT: You know the number of assets you have
7 that are, in my opinion, easily converted into cash. And I
8 have not ordered you as a fine for all of them. Please
9 understand.

10 And I understand that half of them belong -- many of them
11 do not belong to you that makes up your net worth, or at least
12 they belong to others. And I also have taken into
13 consideration that half of them belong to your spouse, in
14 fashioning this fine. And I'm willing to put them on the
15 record if you wish me to do so.

16 THE DEFENDANT: No. Thank you. No.

17 THE COURT: So the fine that I have imposed is
18 \$60,000. It's \$20,000 for the two years, and then the next
19 four months I've added another \$20,000 because of the situation
20 that I feel is necessary to deter others, make them think, make
21 them understand that when they're in a situation like this,
22 they have got to -- they have got to direct their company in a
23 different direction.

24 So having assessed the defendant's ability to pay, payment
25 of the total criminal monetary penalty shall be due as follows:

1 \$100 is due immediately.

2 Within 30 days of the date of this order, the probation
3 officer, if it's necessary, shall recommend a payment schedule
4 to the Court to satisfy any unpaid balance of the criminal
5 monetary penalty. The Court will enter an order scheduling the
6 payment, and any change in this schedule shall be made only by
7 order of the Court.

8 My immediate order, however, is that the interest shall
9 begin to accrue on the criminal monetary penalties after 30
10 days and that the total penalty -- the hundred dollars is due
11 today, and the \$60,000 is due 30 days from today. And if
12 there's some extenuating circumstances, which I do not foresee,
13 why, then you can take that up with the probation officer, Mr.
14 Michael, and he will take it up with the Court.

15 THE DEFENDANT: (Nods head up and down.)

16 THE COURT: Do you have any question about this
17 sentence?

18 THE DEFENDANT: No.

19 THE COURT: Mr. Culum, do you have anything further
20 you want me to discuss on the record about this sentence?

21 MR. CULUM: No, Your Honor.

22 THE COURT: Mr. Michael?

23 MR. MICHAEL: No, Judge.

24 THE COURT: Do you have any questions at this time,
25 Mr. Larson?

1 THE DEFENDANT: No, sir.

2 THE COURT: I notify you that under certain
3 circumstances you have the right to appeal this sentence and,
4 if you're unable to pay the costs of an appeal, you have the
5 right to apply to this Court for leave to proceed in forma
6 pauperis. If you are indigent and cannot retain a lawyer, you
7 may apply, and one will be appointed to represent you on your
8 appeal.

9 I further advise you that in accordance with the provisions
10 of Rule 4(b) of the Rules of Appellate Procedure, you must file
11 your notice of appeal with the Clerk of the United States
12 District Court within 14 days of the filing of the judgment,
13 which will be filed probably later today. Today is February
14 the 3rd, 2010. 14 calendar days from the filing of the
15 judgment will be February 17, 2010.

16 I advise you that if you so request, I will order the Clerk
17 of Courts to prepare and file forthwith your notice of appeal
18 on your behalf.

19 It is further ordered that you shall notify the United
20 States Attorney for the Southern District of Ohio -- well,
21 you'll notify Mr. Culum within 30 days of any change in
22 residence or mailing address till all fines, restitutions,
23 costs and special assessments imposed by this judgment are
24 fully paid.

25 Do you have any requests at this time?

1 THE DEFENDANT: No, sir.

2 THE COURT: Is there anything further from the United
3 States?

4 MR. CULUM: No, Your Honor.

5 THE COURT: Is there anything further from the
6 defendant?

7 MR. MICHAEL: No, Judge.

8 THE COURT: So be it.

9 COURTROOM DEPUTY: All rise. This honorable court is
10 now in recess.

11 (Proceedings CONCLUDED at 11:10 AM.)

12 - - -

13 C E R T I F I C A T E

14 I, Luke T. Lavin, RDR, CRR, the undersigned, certify
15 that the foregoing is a correct transcript from the record of
16 proceedings in the above-entitled matter.

17

18 s/Luke T. Lavin
19 Luke T. Lavin
20 Official Court Reporter

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